Supreme Court, U. S.
FILED
MAY 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976
No.

CHARLES BROWNSELL and
CAZILIE BROWNSELL,

76-1654

Petitioners,

- against -

ARCHIE DAVIDSON and
JOAN BOYD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE,
THE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES:

The Petitioners, as their Petition for Writ of Certiorari, respectfully show as follows:

1. On May 7, 1976, the United States District Court for the Southern District of New York, by Honorable Lloyd F. MacMahon granted the Respondents' motion for judgement on the pleadings dismissing the complaint interposed on behalf of the Petitioners.[1/] On January 7, 1977, the United States Court of Appeals for the Second Circuit issued its order, judgement and decree affirming the order of the said District Court. On March 16, 1977, the United States Court of Appeals for the Second Circuit granted a motion interposed by the Petitioners to recall the mandate, stay its reissuance and fixed the time for the filing of a Petition for Rehearing to and including April 1, 1977. On April 14, 1977, the

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1/ The action was removed from the New York State Supreme Court, under Title 28, United States Code, Section 1442 (a) (1).

United States Court of Appeals for the Second Circuit issued its order denying the Petition for Rehearing. With the exception of the order issued by the United States District Court, previously mentioned, and which is contained therein, none of the aforementioned orders were accompanied by any opinion. Copies of the aforementioned orders are appended hereto.

2. It is the respectful contention of the Petitioners that the United States Court of Appeals for the Second Circuit erred in denying the Petition for Rehearing, and at the same time, in doing so, was in conflict with the holding of this Court as more specifically set forth below. Based upon the orders of the United States Court of Appeals for the Second Circuit, as set forth above, the jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254 (1).

3. The question presented for review is, to wit: Where the complaint of the Petitioners sounds in prima facie tort, did the United States Court of Appeals for the Second Circuit err in affirming the United States District Court for the Southern District of New York, in granting the motion for summary judgement interposed by the Respondents and in dismissing the complaint, rather than remanding the case for trial?

4. This proceeding involves the National Labor Relations Act, as amended, Title 29, United States Code, Section 151, et seq.

5. Petitioner, CHARLES BROWNSELL, was a letter carrier, employed by the United States Postal Service. Petitioner, CAZILIE BROWNSELL, is the wife of CHARLES BROWNSELL. Prior to October 1972,

CHARLES BROWNSELL sustained several on the job injuries. On or about October 6, 1972, CHARLES BROWNSELL was advised by the Respondent, ARCHIE DAVIDSON, that his employment relationship was being severed, terminated or otherwise interrupted, until he was capable of performing all the duties of his position, notwithstanding the fact that prior to such date and subsequent thereto, other employees of the Post Office, letter carriers and others, who suffered from long-term illnesses and disabilities were otherwise treated, in that they were allowed to perform light duties, that is not their full duties, and were also permitted to perform their duties on a less than full time basis. It should be noted, that CHARLES BROWNSELL was, at all times material, an officer of the Union representing the employees at the Post Office.

Respondents, ARCHIE DAVIDSON and JOAN BOYD, were at all times material, respectively, the Postmaster and Superintendent of Mails at the facility where CHARLES BROWNSELL was employed. Both Respondents failed, refused and neglected to process official claims forms in connection with the on-the-job injuries. In point of fact, CHARLES BROWNSELL did in fact receive his lawful compensation benefits, but they were not received and did not commence until the year 1974. In addition, Respondents refused to re-employ CHARLES BROWNSELL.

On April 4, 1973 and July 24, 1973, CHARLES BROWNSELL filed charges against the United States Postal Service with the National Labor Relations Board. On or about September 22, 1975, CHARLES BROWNSELL, the United States Postal Service and the National

Labor Relations Board entered into a Settlement Agreement, consisting of two parts which were incorporated together by reference, which Agreement was fully approved on September 23, 1975. By the terms of the Settlement Agreement, CHARLES BROWNSELL received the sum of $5,000.00 against lost wages; credits towards annual and sick leave; a waiver by the United States Postal Service of certain claims based upon overpayment for leave time; reinstatement as a letter carrier; and, the United States Postal Service was required to post a notice provided by the National Labor Relations Board.

The complaint, interposed for and on behalf of the Petitioners, alleges that the acts and conduct of the Respondents complained of were done willfully, maliciously and without legal authority, causing CHARLES BROWNSELL

monetary losses in addition to lost wages, and he was required to expend money for legal services in connection with the procurement and obtaining of his claims benefits for on-the-job injuries and to obtain his reinstatement through the National Labor Relations Board. Moreover, the complaint alleges, that both of the Petitioners were forced and required to seek the aid of the local social services department through an application for and receipt of welfare benefits, and that they thereby suffered serious and irreparable physical, emotional, mental and psychological injuries and anguish, as a result of the Respondents' conduct, in that the Petitioners were subjected to gross embarrassment because of the delay and receipt of wages and compensation benefits, and the loss of employment of the Petitioner CHARLES

BROWNSELL, and that both of the Petitioners were subjected to unusual and deep debt requiring that they be placed upon the welfare rolls of the local social services department.

6. This Court recently considered and issued its opinion in Farmer, Special Administrator v. United Brotherhood of Carpenters & Joiners of America, Local 25, et al., Docket No. 75-804, argued November 8, 1976 and decided March 7, 1977, which in essence held that the National Labor Relations Act, as amended, and the National Labor Relations Board, do not afford remedies for all damages flowing from acts and conduct arising from an unfair labor practice. The Courts below are directed to try cases, being careful to distinguish between the unfair labor practice itself and the superimposed other civil wrongs, and damages may not be assessed for the

unfair labor practices, which are left to the National Labor Relations Board, but may be assessed for other civil wrongs. It seems to the Petitioners that the United States Court of Appeals for the Second Circuit has decided the federal question involved here in a way in conflict with the Farmer case decided by this Court.

WHEREFORE, the Petitioners respectfully request that their Petition for a Writ of Certiorari be granted, together with such other and further relief as may seem just and proper to this Court.

DATED: NEW CITY, NEW YORK
May 20, 1977

Respectfully submitted,

RICHARD W. ROSEN, Esq.
Attorney for Petitioners

APPENDIX A

Brownsell v. Davidson

U.S. DISTRICT COURT
MAY 10 1976
S.D. OF N.Y.

ENDORSEMENT
75 Civ. 5241-LFM

Defendants, move, pursuant to Rule 12(c), Fed. R. Civ. P., for judgment on the pleadings dismissing the complaint on the ground that this court lacks jurisdiction.

The complaint alleges that defendants, the Postmaster of New City, New York and the Supervisor of Mails and Delivery at the New City Post Office, failed to process claims by plaintiff, Charles Brownsell, relating to on-the-job injuries and laid him off between October 6, 1972 and September 29, 1975 in retaliation for his activities as a representative of

Branch 5229, National Association of Letter Carriers. These allegations are essentially claims of unfair labor practices under Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a). The National Labor Relations Board has exclusive jurisdiction over claims arguably subject to the Act. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959).

Accordingly, defendants' motion for judgment on the pleadings dismissing the complaint is granted.

So ordered.

Dated: New York, N. Y.
May 7, 1976

/s/ Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of January one thousand nine hundred and seventy-seven.

Present:

HON. LEONARD P. MOORE

HON. JAMES L. OAKES

HON. WILLIAM H. TIMBERS

Circuit Judges,

Charles Brownsell and Cazilie Brownsell, Plaintiffs-Appellants	)	
v.	)	76-6104
Archie Davidson and Joan Boyd, Defendants-Appellees.	)	

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was taken on submission.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN,
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Sixteenth day of March, one thousand nine hundred and Seventy-seven.

Charles Brownsell and
Cazilie Brownsell,

Plaintiffs-Appellants,

v. 76-6104

Archie Davidson and
Joan Boyd,

Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the appellant by

notice of motion dated March 2, 1977 to recall the mandate and stay its reissuance and fix the time to file a petition for rehearing to and including April 1, 1977, be and it hereby is granted.

GRANTED.

/s/ Leonard P. Moore
LEONARD P. MOORE

/s/ James L. Oakes
JAMES L. OAKES

/s/ William H. Timbers
WILLIAM H. TIMBERS
Circuit Judges

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
F I L E D
A. DANIEL FUSARO, CLERK

APPENDIX D

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of April, one thousand nine hundred and seventy-seven

Present:

HON. LEONARD P. MOORE

HON. JAMES L. OAKES

HON. WILLIAM H. TIMBERS

Circuit Judges.

CHARLES BROWNSELL and
CAZILIE BROWNSELL

Plaintiffs-Appellants,

v. 76-

ARCHIE DAVIDSON and
JOAN BOYD,

Defendants-Appellees

A petition for a rehearing having been filed herein by counsel for the plaintiffs-appellants

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
F I L E D
APR 14 1977
A. DANIEL FUSARO, CLERK

Supreme Court, U. S.
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No. 76-1654

In the Supreme Court of the United States

OCTOBER TERM, 1977

CHARLES BROWNSELL, ET UX., PETITIONERS

v.

ARCHIE DAVIDSON AND JOAN BOYD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

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CHARLES BROWNSELL, ET UX., PETITIONERS

v.

ARCHIE DAVIDSON AND JOAN BOYD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners seek review of the dismissal of their complaint. That complaint alleged the same facts that had formed the basis for petitioner Charles Brownsell's earlier unfair labor practice claim against his employer, the United States Postal Service, which was settled by an agreement between the parties.

Petitioner Charles Brownsell[1] was an employee of the Postal Service in New City, New York (Pet. 4). Petitioner alleged that because of on-the-job injuries he became unable to perform the duties of his route full-time. He worked part-time until respondent Archie Davidson, the Postmaster of New City, directed him not to return until he could work

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[1]Petitioner Cazilie Brownsell is Charles Brownsell's wife (Pet. 4).

full-time (Pet. 4-5). Petitioner did not work between October 6, 1972, and September 29, 1975 (Pet. App. 1a). He filed two unfair labor practice charges with the National Labor Relations Board, claiming that the Postal Service had violated Section 8(a) of the National Labor Relations Act, 61 Stat. 140, as amended, 29 U.S.C. 158(a), by laying him off and by refusing or neglecting to process his claims with respect to his on-the-job injuries because of his activities on behalf of the National Association of Letter Carriers (Pet. 6).

On September 22, 1975, petitioner and the Postal Service entered into a settlement agreement regarding his unfair labor practice charges, pursuant to which he received, *inter alia*, $5,000 in back pay (Ct. App. 21a-26a).[2]

On October 2, 1975 (Ct. App. 2), 10 days after he entered into the settlement agreement, petitioner filed in state court a complaint sounding in tort, naming as defendants the two

[2]"Ct. App." refers to the brief and appendix filed in the court of appeals. A copy will be lodged with this Court. The other terms of this settlement agreement were as follows: It was agreed that the government would not offset the amounts petitioner had been paid as disability compensation (Ct. App. 22a). The Postal Service credited petitioner with 297 hours of annual leave and 148 hours of sick leave, representing 80% of the leave that petitioner would have accrued if he had worked between July 1, 1973, and September 22, 1975. The Postal Service agreed to apply certain hours of annual leave and sick leave to a debt petitioner owed the Postal Service, and to supply petitioner with written evidence that the debt had been satisfied. The Postal Service agreed to reinstate petitioner to his former route as a letter carrier, with the understanding that he was under a medical restriction and would not be required to lift items weighing in excess of 15 pounds or to perform duties necessitating excessive bending, that his duties did not require foot deliveries, and that he would perform on a 40-hour schedule at a level of "reasonably normal productivity" (Ct. App. 23a-24a). The reinstatement of petitioner would be without prejudice to his seniority and other rights and privileges. None of the above was to be an admission that the Postal Service or any of its officers or agents had violated the National Labor Relations Act (Ct. App. 24).

Postal Service employees whose actions gave rise to the claims petitioner had just settled (Ct. App. 6a-7a). The case was removed to the federal district court under 28 U.S.C. 1441(a) and 1442(a) (Ct. App. 2a-5a). The tort claim, like petitioner's unfair labor practice charges, was based on the alleged failure to process claim forms and wrongful separation from work because of petitioner's union activities (Ct. App. 8a-9a). In his tort suit petitioner sought damages for loss of salary and benefits, for legal services, and for mental injury, as well as punitive damages (Ct. App. 10a-12a). In addition, petitioner Cazilie Brownsell sought damages for mental injury and for embarrassment because of the loss of her husband's earnings and because of the public humiliation of receiving welfare payments (Ct. App. 12a-14a). The district court dismissed the complaint on the grounds that the allegations were essentially claims of unfair labor practices under Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), over which the National Labor Relations Board had exclusive jurisdiction (Pet. App. 1a-2a). The court of appeals summarily affirmed (Pet. App. 3a-4a).

1. This case does not merit review in this Court. The alleged wrongful acts were legally cognizable only as unfair labor practices. Petitioner's settlement of his unfair labor practice claims against the Postal Service on September 22, 1975, constitutes an absolute and complete defense to any action based on those claims. Cf. 28 U.S.C. 2672 (federal agency's settlement of tort claims against the United States constitutes complete release of any claim against the employee whose act gave rise to the claim, as well as any claim against the government); *Cox* v. *City of Freeman, Missouri*, 321 F. 2d 887 (C.A. 8).

2. Moreover, with limited exceptions not applicable here, the courts do not have jurisdiction over actions

asserting no wrongs other than unfair labor practices. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236. Petitioners rely on *Farmer* v. *United Brotherhood of Carpenters & Joiners of America, Local 25*, No. 75-804, decided March 7, 1977, which holds that courts may in certain circumstances have concurrent jurisdiction with the National Labor Relations Board. In *Farmer*, however, this Court held that for such concurrent jurisdiction to arise it is essential that the state tort either be unrelated to employment discrimination or be based upon the particularly abusive manner in which the discrimination was accomplished or threatened; the tort may not be merely the actual or threatened discrimination itself (slip op. 14). The Court stressed that something more than the "considerable emotional distress and anxiety" that may occur in any unfair labor practice case is required to justify concurrent jurisdiction (*ibid.*).

Petitioners do not contend that the allegedly discriminatory acts forming the basis of their state tort complaint were committed in an especially abusive or outrageous manner. The complaint simply alleges that respondents failed to file petitioner's claims for on-the-job injuries and then laid him off because of his union activities, and that these actions were willful, malicious, and unlawful, and that their purpose was retaliation or punishment for petitioner's union activities.[3] These allegations also constituted the

[3]The actions complained of are that respondents (1) "failed, refused and neglected to process official claims forms relating to petitioner's on-the-job-injuries"; (2) "terminated [or] laid off" petitioner; and (3) "did deny * * * his application * * * to be reinstated to his former position" (Ct. App. 8a). The complaint alleges that these acts were "based upon and in retaliation for the exercise by [petitioner] of his representative capacities on behalf of [the union]" (Ct. App. 9a). Additionally, the complaint asserts that respondents' actions were "done willfully, maliciously, and without legal authority, and for the purpose of retaliation, punishment and to inflict injury * * * for his activities on behalf of [the union]" (Ct. App. 9a, 12a).

substance of petitioner's unfair labor practice claim. As this Court stated in *National Labor Relations Board* v. *Great Dane Trailers*, 388 U.S. 26, 33, "[t]he statutory language 'discrimination . . . to . . . discourage' [membership in a labor organization] means that the finding of a violation normally turns on whether the discriminatory conduct was motivated by an antiunion purpose." Petitioners' allegations are a far cry from the "alleged campaign of harassment, public ridicule and verbal abuse" that this Court found to be sufficient to support concurrent jurisdiction in *Farmer* (slip op. 15).

The complaint demonstrates that this is nothing more than a typical unfair labor practice case (see note 3, *supra*). Therefore, under *Farmer*, the courts have no jurisdiction to consider petitioner's claims.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST

[4]The court of appeals had the opportunity to consider this case in light of *Farmer*. Petitioners described *Farmer* in their petition for rehearing, and observed that it had been argued in this Court. The petition for rehearing was denied on April 14, 1977, five weeks after the decision in *Farmer* (Pet. App. 8a).